

LSU Journal of Energy Law and Resources

Volume 7
Issue 2 2019

8-5-2019

State and Local Regulation of Drilling in Louisiana

Gerald F. Slattery

Repository Citation

Gerald F. Slattery, *State and Local Regulation of Drilling in Louisiana*, 7 LSU J. of Energy L. & Resources (2019)

Available at: <https://digitalcommons.law.lsu.edu/jelr/vol7/iss2/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in LSU Journal of Energy Law and Resources by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

State and Local Regulation of Drilling in Louisiana

Gerald F. Slattery, Jr.*

TABLE OF CONTENTS

Introduction	315
I. The Commissioner’s Plenary Authority	316
A. Purpose and Powers of the Office of Conservation	316
1. Prevention of Waste of Oil or Gas	316
2. General Authority and Specific Powers	317
B. Drilling Permits and Procedure.....	324
1. In General: La. Rev. Stat. § 30:28.....	324
2. In Particular: Statewide Order No. 29-B	326
III. Local Land Use and Zoning Ordinances.....	327
A. Home Rule Charters: First Class, Second Class, or None	327
B. State Police Power v. Local Ordinances	328
C. Preemption of the Permitting Process.....	333
1. <i>Traver</i> : Concurrent Jurisdiction?	333
2. <i>Desormeaux</i> : Saltwater Disposal Wells	335
3. <i>Energy Management</i> : City Ordinances	336
4. <i>Welsh</i> : Parish Ordinances.....	340
Conclusion.....	342

INTRODUCTION

Oil and gas wells in Louisiana are often located in remote areas, far from population centers; but, sometimes, the best location for a well is in an area subject to zoning regulations enacted by a city or parish. These

Copyright 2019, GERALD F. SLATTERY, JR.

* Before his retirement from the practice of law, Gerald F. Slattery, Jr. was a shareholder in the New Orleans-based law firm of Slattery, Marino & Roberts. He has published on various aspects of oil, gas and mineral law and has lectured at numerous energy industry-sponsored seminars and programs. He received a Juris Doctor degree from Tulane Law School in 1978, where he was a Senior Fellow and Managing Editor of the Tulane Law Review, and received a Bachelor of Science degree from Louisiana State University in 1973. He has taught Mineral Law as an adjunct professor at Loyola (New Orleans) Law School.

zoning regulations may prohibit drilling or impose requirements greater than those imposed under state law. Such circumstances set the stage for a possible confrontation between Louisiana's police power—which includes the Office of Conservation's exclusive power to issue drilling permits—and the power of the city or parish to enact land use ordinances for the health and welfare of its residents.

The 1974 Louisiana Constitution, statutes, and case law indicate that in the event of such a confrontation, the state's police power should trump the city's or parish's ordinances. This means that an operator that holds a valid drilling permit issued by the Office of Conservation should be able to drill its well at the location specified in the permit, and municipal and parochial authorities should not be able to prevent drilling or impose additional requirements on the operator.

This Article reviews the history of the Louisiana Office of Conservation and outlines the parameters of its jurisdiction over oil and gas drilling in Louisiana granted by the 1974 Louisiana Constitution and its predecessor, the 1921 Louisiana Constitution, to carry out a mandate to conserve Louisiana's natural resources. In addition, it addresses the powers and authority of the Commissioner, both generally and in the specific context of drilling permits issued pursuant to Title 30 of the Louisiana Revised Statutes. The Article also discusses the dignity of municipal and parochial land use ordinances under the 1974 Louisiana Constitution and explores how courts have resolved the tension between the state's police power and local governments' zoning authority in the context of drilling for oil and gas.

I. THE COMMISSIONER'S PLENARY AUTHORITY

A. Purpose and Powers of the Office of Conservation

1. Prevention of Waste of Oil or Gas

Chapter 1 (“Commissioner of Conservation”) of Subtitle I (“Minerals, Oil and Gas”) of Title 30 of the Louisiana Revised Statutes sets forth the purpose and powers of the Office of Conservation in general terms. Section 1 of Title 30 establishes the “Department” (in common parlance referred to as the “Office”) of Conservation, which is a subordinate part of the cabinet-level Department of Natural Resources. The Commissioner “direct[s] and control[s]” the Office of Conservation, which has jurisdiction over “[a]ll natural resources of the state not within the jurisdiction of other state departments or agencies,” and over “[t]he

disposal of any waste product into the subsurface by means of a disposal well. . . .”¹

Section 2 of Title 30, in effect a prelude to section 4, states simply, “[W]aste of oil or gas as defined in this chapter is prohibited.” In section 4, the jurisdiction of the Commissioner and his duties and powers are set forth in detail. The section begins with a broad, general grant of authority² and continues with specific grants of authority to conduct “such inquiries as [the Commissioner] thinks proper,” and, after notice and hearing, to promulgate “any reasonable rules, regulations, and orders that are necessary from time to time” in the exercise of his powers.³ Paragraph C of section 4 then lists some of the purposes for which the Commissioner may promulgate rules, regulations, or orders, which include: prevention of intrusion of water into oil or gas strata; plugging and abandoning of wells, site clearance, and posting of bonds for same; filing of drilling reports, logs, and electrical surveys; fixing of gas-oil ratios; secondary recovery methods; prorating production in order to prevent waste; spacing and establishment of drilling units; saltwater disposal wells; and construction, design, and operation of carbon dioxide pipelines serving secondary and tertiary recovery projects.⁴

2. General Authority and Specific Powers

The evolution of the Commissioner’s powers, from the establishment of the Office of Conservation in the 1921 Louisiana Constitution to the detailed listing of specific powers in Title 30 of the Revised Statutes, was explained in 1957 by the Louisiana Supreme Court in *Delatte v. Woods*.⁵ In that case, near the end of a mineral lease’s two-year primary term, the lessee had obtained from the lessors an amendment that (i) allowed the lease to be extended for up to an additional year without drilling, by means of monthly \$1,000 payments and, (ii) assuming a well was spudded within the one-year extended period, then required the payment of \$500 per month after spudding until production was obtained.

The lessee paid the \$1,000 payments for ten months then began tendering \$500 monthly payments, which the lessors rejected. The lessee’s theory justifying the reduced post-spudding monthly payments was that a

1. LA. REV. STAT. §§ 30:1(A), 1(C), 1(D).

2. “Jurisdiction and authority over all persons and property necessary to enforce effectively the provisions of this Chapter” *Id.* § 30:4(A).

3. *Id.* §§ 30:4(B)-(C).

4. *Id.* §§ 30:4(C)(1)(a)(ii), 4(C)(1)(a)(iv), 4(C)(2), 4(C)(5), 4(C)(10), 4(C)(11), 4(C)(13), 4(C)(16)(a), 4(C)(17)(a).

5. *Delatte v. Woods*, 94 So. 2d 281 (La. 1957).

well had been drilled on adjacent lands not owned by the lessors, and some of the lessors' lands were included in the drilling unit⁶ served by this well.⁷ The lessee reasoned that the language of the extension together with the pooling clause allowed the lessee to treat the off-site unit well as the well contemplated by the extension. The lessor disagreed, filed suit, and prevailed at the district court, which awarded among other remedies the cancellation of the lease and attorney's fees.⁸

The Louisiana Supreme Court, addressing whether the Commissioner's unitization order including part of the lessors' lands in the unit had the incidental effect of maintaining the lease, explained the history and purpose of the Office of Conservation. The 1921 Louisiana Constitution created the Office "for the sole purpose of protecting, conserving and replenishing the natural resources of this State. . . ."⁹ Pursuant to this constitutional authority, the legislature, in Act No. 157 of 1940, enacted Title 30 in the Louisiana Revised Statutes, which the Court described as:

a comprehensive conservation statute, giving the Commissioner the authority, among other things, to prohibit the waste of oil and gas and to avoid the drilling of unnecessary wells by integrating into drilling units the maximum area he finds, as a fact, one well can efficiently and economically drain.¹⁰

The Court, applying the quoted portion of Title 30, described how to resolve the tension between an individual's contractual rights and the State's police power. The Court's language foreshadowed a conflict that would occur thirty-seven years later¹¹ between local zoning ordinances and the state's police power: "[I]ndividual and property rights and contractual relations must yield to a proper exercise of the police power; and it is in the light of this principle that such laws [as Title 30] are

6. According to LA. REV. STAT. § 30:9(B), the Commissioner is required to establish drilling units "[f]or the prevention of waste and to avoid the drilling of unnecessary wells. . . ." A drilling unit is "the maximum area which may be efficiently and economically drained by the well or wells designated to serve the drilling unit as the unit well. . . ." *Id.* The location of the well for the drilling unit is designated by the Commissioner. *Id.* § 9(C).

7. The pooling clause in the lease provided that the inclusion of any part of the leased lands in a unit served by an offsite unit well would maintain the lease as to *all* of the covered lands.

8. *Delatte*, 94 So. 2d at 286.

9. *Id.* (quoting *Arkansas Louisiana Gas Co. v. Southwest Natural Prod. Co.*, 60 So. 2d 9, 10 (La. 1952)).

10. *Id.* at 286-87 (citing LA. REV. STAT. § 30:2 et seq.).

11. In *City of New Orleans v. Bd. of Comm'rs*, 640 So. 2d 237 (La. 1994).

recognized as constitutionally valid.”¹² Accordingly, the *Delatte* Court held that, because part of the leased acreage was included in the unit served by the offsite well, the lessee was relieved of any drilling obligation, and the well maintained the portion of the leased premises outside the unit as well as the portion inside the unit.¹³

Almost thirty years after *Delatte*, another unitization dispute provided the Louisiana Supreme Court with a teaching moment regarding the effect of the Commissioner’s unitization powers on private property rights. In *Nunez v. Wainoco Oil & Gas Co.*, the plaintiff’s unleased property had been included (as he had urged during the unitization hearing) in a unit.¹⁴ The unit operator obtained a drilling permit, which sited the unit well on leased property within the unit, adjacent to the plaintiff’s unleased property also within the unit.¹⁵

When the well was actually drilled, however, it was located one foot to the north and twenty-two feet to the west of the permitted site, which crowded the plaintiff’s property line. (The drilling permit was later amended to allow for this changed location.) The well bottomed at 11,730 feet, and a directional survey showed that the bottom hole location, and as much as 750 feet of the well bore, was underneath the plaintiff’s property.¹⁶ Notwithstanding (i) that the bottom hole location was more than two miles below the surface of his property, (ii) that his earlier plea that his property be included in the unit, and (iii) that he would receive his proportionate share of the proceeds of unit production, the plaintiff nonetheless sued the unit operator, other property owners within the unit, and the Commissioner of Conservation, alleging that the intrusion of the well bore beneath his property constituted a trespass.¹⁷

The plaintiff sought a mandatory injunction requiring the unit operator to remove the well bore and moved for summary judgment. In response, the defendants filed cross-motions for summary judgment based on the Commissioner’s authority and duty to designate the unit well. The district court denied the plaintiff’s motion and granted the defendants’ motions, affirming the Commissioner’s earlier refusal to order the removal of the well bore and the right of the defendants to continue to operate the well.¹⁸ On appeal, the Louisiana First Circuit Court of Appeal affirmed the dismissal of the Commissioner from the suit but held that his unitization

12. *Delatte*, 94 So. 2d at 287.

13. *Id.* at 288.

14. *Nunez v. Wainoco Oil & Gas Co.*, 488 So. 2d 955 (La. 1986).

15. *Id.* at 957.

16. *Id.*

17. *Id.* at 958.

18. *Id.*

order “did not and could not authorize drilling on or under unleased property without the consent of the landowner.”¹⁹ The First Circuit therefore reinstated the plaintiff’s case and remanded it to the district court for a determination of whether a subsurface trespass had occurred and, if so, whether it was in good faith or bad faith. The First Circuit reasoned that, if bad faith were found, the defendants could be ordered to remove the encroachment and pay damages.²⁰

The Louisiana Supreme Court granted the defendants’ application for a writ of certiorari. The Court noted that article 490 of the Louisiana Civil Code states that the ownership of land carries with it the ownership of everything beneath, “[u]nless otherwise provided by law.”²¹ The Court framed the issue before it as “whether the formation of a compulsory unit, as permitted in La. Rev. Stat. 30:10, affects the generally applicable principles concerning ownership of property and/or alters the concept of trespass beneath the surface owner’s tract.”²²

The Court’s analysis and resolution of this issue, authored by Justice Calogero, is scholarly and thorough. The Court began its analysis by tracing the legal history of oil and gas exploration in Louisiana, noting that drive mechanisms in underground reservoirs were poorly understood in the early days of oil and gas exploration, when it was thought that “oil flowed in underground rivers and an analogy was seen between the ownership of oil and the ownership of water and animals which traverse one’s property.”²³ This led to what is known as the “rule of capture,” defined as:

a rule of law (sometimes called a rule of convenience) arising from ownership of property, or the right to produce oil and gas, by virtue of which an operator who drills on his own land, or land held under an oil and gas lease or other instrument, acquires title to the oil which he legally produces from the well, whether or not drainage takes place from surrounding properties.²⁴

19. *Id.*

20. *Nunez*, 488 So. 2d. at 958.

21. *Id.* at 959 (quoting LA. CIV. CODE art. 490).

22. *Nunez*, 488 So. 2d. at 959.

23. *Id.* at 960.

24. *Id.* (quoting HARRIET DAGGETT, MINERAL RIGHTS IN LOUISIANA, at 419-21 (1949)).

As a predictable consequence of Louisiana's adoption of the rule of capture, the ensuing period was characterized by "haste, inefficient operations, and immeasurable waste within the ground and above."²⁵ The Court elaborated:

[W]ithout the power to regulate or control conditions in an oilfield, the temptation to acquire quick riches might easily produce an intolerable situation in drilling indiscriminately upon any size or shape of tract sufficient to permit derrick operations, resulting in waste and exhaustion of underground energy consisting of natural gas, etc. and ultimately restricting recovery, involving useless expenditures by operators and preventing some, if not all, from recovering their investments.²⁶

Over time, the Louisiana legislature remedied this situation in a series of acts:

- a. 1906 La. Acts No. 71: Following a natural gas blowout in the Caddo Field in north Louisiana, the legislature made it a criminal offense to negligently permit a gas well to burn wastefully.
- b. 1908 La. Acts No. 144: The legislature created a Board of Commissioners, which it authorized to investigate and report on the condition of the natural resources of the state.
- c. 1924 La. Acts Nos. 252 and 253: The first all-inclusive statutes for gas and oil were enacted, and the principle of co-ownership in a common source of supply, proportionate to ownership of the surface, was recognized.
- d. 1936 La. Acts No. 225: A comprehensive statute, modeled after New Mexico's law, regulated the spacing of wells and authorized compulsory unitization. This legislation failed, both because it did not define "waste" and because its procedural articles proved inadequate.
- e. 1940 La. Acts No. 157: This law completely revised existing legislation, embodying the best features of New Mexico and Arkansas law. "This act, as amended, constitutes Louisiana's basic conservation law with respect to the oil and gas industry."²⁷

Having thus reviewed the history of oil and gas legislation in Louisiana in order to provide context, the Court turned its attention to the issue before it. In the Court's mind, the formation of the unit effectively disposed of

25. *Nunez*, 488 So. 2d at 960.

26. *Id.* (quoting *Lilly v. Conserv. Comm'rs*, 29 F.Supp. 892, 897 (E.D. La. 1939)).

27. *Nunez*, 488 So. 2d at 961.

the plaintiff's trespass claim. According to *Mire v. Hawkins*, unitization, whether compulsory or voluntary, departs from traditional notions of private property and converts separate interests within the drilling unit into a common interest, with regard to unit drilling and development.²⁸ Although the plaintiff owned the surface, pursuant to article 6 of the Louisiana Mineral Code²⁹ he did not own the oil and gas underneath, only the right to explore and develop.

This right to explore and develop one's property, according to the Louisiana Constitution, "is subject to reasonable statutory restrictions and the reasonable exercise of police power."³⁰ In the case before the Court, these restrictions took the form of the Commissioner's unitization order. Moreover, the plaintiff's right to explore and develop his property was further circumscribed by the correlative rights of the other unit owners, who together with the plaintiff co-owned interests in a common reservoir.³¹ Having already noted that the plaintiff suffered no damages, as he would receive his proportionate share of production from the unit, the Court relied on these principles to hold that no trespass had occurred.³² The Court accordingly reversed the court of appeal and dismissed the plaintiff's suit.

The Louisiana Supreme Court again examined the Commissioner of Conservation's power and authority in a unitization context eight years later in *Hunt Oil Co. v. Batchelor*.³³ In that case, following hearings, the Office of Conservation dissolved certain units and created two new units, which excluded some formerly-included acreage and included some formerly-excluded acreage. The orders when issued were made effective ninety-six days earlier, when the hearings concluded.³⁴ In the interim, production had been allocated pursuant to the old, superseded units, so

28. *Mire v. Hawkins*, 186 So. 2d 591, 596 (La. 1966).

29. LA. REV. STAT. § 31:6 ("Ownership of land does not include ownership of oil, gas and other minerals. . . . The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.").

30. LA. CONST. art. I, § 4 (1974).

31. LA. REV. STAT. § 30:9-10 ("Landowners and others with rights in a common reservoir or deposit of minerals have correlative rights and duties with respect to one another in the development and production of the common source of minerals A person with rights in a common reservoir or deposit of minerals may not make works, operate, or otherwise use his rights so as to deprive another intentionally or negligently of the liberty of enjoying his rights, or that may intentionally or negligently cause damage to him. . . .").

32. *Nunez*, 488 So. 2d at 964.

33. *Hunt Oil Co. v. Batchelor*, 644 So. 2d 191 (La. 1994).

34. *Id.* at 194.

that, when the new unitization orders issued, automatically some unit owners were underproduced³⁵ and some were overproduced.³⁶ There was no gas balancing agreement or joint operating agreement in effect between the overproduced and underproduced parties to address the imbalance.³⁷

The underproduced parties therefore applied to the Commissioner for an order requiring the overproduced parties to remedy the imbalance by means of a cash accounting. The overproduced parties opposed the request, arguing for a correction of the imbalance by production over time, referred to as balancing in kind. After a hearing, the Commissioner ordered balancing in kind, which evidence showed would require approximately twenty-two months.³⁸

Disappointed with the Commissioner's order, the underproduced parties filed suit in the 19th Judicial District Court in Baton Rouge, which has exclusive jurisdiction for judicial review of the Commissioner's orders.³⁹ The Commissioner and the overproduced parties defended the Commissioner's order, but the district court reversed the order and ordered cash balancing. The Louisiana Supreme Court, "[r]ecognizing the importance of stability and predictability in the oil and gas industry in Louisiana,"⁴⁰ granted the Commissioner's and the overproduced parties' petition for a writ of certiorari.

The Court's decision, which carefully considered unit production balancing issues, bears upon the Commissioner's preemptive powers over drilling in two important respects: It affirmed the primacy of the Commissioner's authority over conservation matters—an issue of inherent statewide concern—and provided guidance to lower courts on the standard of review applicable to the Commissioner's fact finding and conclusions. On the first issue, the primacy of the Commissioner's authority, the Court said, "[T]he authority and responsibility for conserving Louisiana's oil and gas resources are virtually entirely vested in the office of the Commissioner of Conservation. . . ."⁴¹ On the second issue, emphasizing the deference that courts owe agency actions, the court stated, "The manifest error test . . . is used in reviewing the facts as found by the agency, as opposed to the arbitrariness test used in reviewing conclusions and exercises of agency

35. These had received less than their allocable share of production under the new unit orders.

36. These had received more than their allocable share of production under the new unit orders.

37. *Id.*

38. *Hunt Oil Co.*, 644 So. 2d at 195 & n.8.

39. Pursuant to LA. REV. STAT. § 30:12 (2017).

40. *Hunt Oil Co.*, 644 So. 2d at 196.

41. *Id.* at 197.

discretion.”⁴² The court explained the “manifest error” test and the “arbitrariness” test as follows:

[T]he Commissioner’s findings of fact are entitled to great weight by a reviewing court and, unless manifestly erroneous or clearly wrong, should not be reversed. . . . Furthermore, in reviewing the conclusions and exercises of agency discretion by the Commissioner, the reviewing court must apply the arbitrariness test, and the party challenging the Commissioner’s decision must make a clear showing that the administrative action was arbitrary and capricious. . . . It is fundamental that the district court must not weigh *de novo* the evidence presented to the Commissioner and substitute its judgment for that of the Commissioner.⁴³

Applying these principles, the Court chided the First Circuit for substituting its judgment for that of the Commissioner⁴⁴ and reinstated the Commissioner’s order directing balancing in kind.⁴⁵

The Louisiana Supreme Court in *Delatte, Nunez, and Batchelor* recognized that conservation of resources and prevention of waste are inherently matters of statewide concern. These concerns, which in those cases arose in a unitization context, are also profoundly impacted by drilling rules and regulations. This suggests that the drilling statutes in Title 30 and the drilling regulations in Statewide Order No. 29-B should preempt municipal and parochial zoning and land use ordinances that would prohibit or make more burdensome drilling activities that have been permitted by the Office of Conservation.

B. Drilling Permits and Procedure

1. In General: La. Rev. Stat. § 30:28

The steps in the permitting process are set forth in section 28 of Title 30 of the Louisiana Revised Statutes. Under subsection A, a drilling permit is required before any well or test well may be drilled, and under subsection B(1) and (2), the permit is valid for either six months or a year

42. *Id.* at 199 (quoting *Save Ourselves, Inc. v. Louisiana Env’tl. Control Comm’n*, 452 So. 2d 1152, 1159 (La. 1984)).

43. *Id.* at 200 (citing *Save Ourselves*; see also *Amoco Prod. Co. v. Thompson*, 566 So. 2d 138, 145 (La. App. 1st Cir.), *writ denied*, 571 So. 2d 627 (La. 1990)).

44. *Id.* at 204 (“[T]he court of appeal improperly substituted its judgment for that of the Commissioner when it held that balancing in kind would take an ‘inordinate’ amount of time.”).

45. *Id.* at 205.

from its issuance. No permit to drill a well or test well will issue until the applicant satisfies the conditions of subsection D:

- (1) The application for the permit must be accompanied by a location plat, certified by a professional land surveyor, which shows the proposed well site in relation to the surrounding property within a 500-foot radius.
- (2), (3) If a residential or commercial structure not owned by the applicant or his lessor or a predecessor in interest is located within the 500-foot radius, the Commissioner notifies the owners of any such structure and the local governing authority, and also notifies them of a public hearing about the proposed well.
- (4), (5), (6) Any notified property owner or local governing authority may request a public hearing about whether the permit should issue. The request must be made within ten days of the mailing of the Commissioner's notice. If a hearing is requested, it "shall" be held, affording property owners and local government representatives the opportunity to be heard. The permit will not issue until the public hearing is concluded and the Commissioner has considered comments and information presented at the hearing.
- (7), (8) If the certified location plat does not show any residential or commercial structure not owned by the applicant, his lessor or other predecessor in interest within the 500-foot radius of the proposed well site, the permit will issue. Workover rigs are exempt from the provisions of subsection D.

Subsection E of section 28 exempts applicants for permits for wells less than 10,000 feet deep from complying with subsection D. Subsection F is strong evidence of the legislature's intent that the Commissioner's authority over drilling be preemptive. The point is made emphatically and repeatedly:

The issuance of the permit by the Commissioner of Conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a

permit.⁴⁶

Subsection G of section 28 directs the Commissioner to promulgate rules, regulations and orders regarding an operator's certification of the quality of surface water intended to be used in drilling operations. This directive is meant to "ensure ground water aquifer safety."⁴⁷

2. *In Particular: Statewide Order No. 29-B*

The Commissioner's regulations governing permitting and procedures for drilling are codified in Statewide Order No. 29-B, Part XIX of Title 43 of the Louisiana Administrative Code, at section 101 and following.⁴⁸ Section 103, in subsection C, repeats the prohibition in La. Rev. Stat. section 30:28(A) against drilling before a permit has issued. Subsection C goes on to provide that if the applicant performs some predrilling work before the permit issues, such as digging pits or erecting buildings or derricks, it does so at its own risk. Detailed requirements governing signage for wells appear in subsection E of section 103.

Section 104 addresses financial security to be posted by permit applicants. According to subsection A of section 104, the purpose of financial security for a well is "in order to ensure that such well is plugged and abandoned and associated site restoration is accomplished." Pursuant to subsection B, financial security may be in the form of a certificate of deposit, a performance bond, a letter of credit, or a site-specific trust account.

Section 105 of Title 43 of the Administrative Code states that permits are required for several kinds of post-drilling repair operations, including operations to plug and abandon, acidize, deepen, perforate, squeeze, sidetrack, pull casing, and rework wells. Section 107, dealing with records, requires that electrical logs be sent to the Office of Conservation within ten days after completion. Requirements for casing programs, blowout preventers, and casing heads are set forth in sections 109, 111, and 113, respectively.

Section 115 contains detailed requirements for the mitigation of fire hazards, and section 117 permits Conservation inspectors and engineers to inspect mud records and to test mud and other drilling fluids. If "conditions and tests indicate a need for a change in the mud or drilling fluid program in order to ensure proper control of the well," the Conservation district manager "shall" require the operator to correct the problem. Section 119 addresses well allowables and completions; section 121, production,

46. LA. REV. STAT. § 30:28(F) (2000) (emphasis added).

47. LA. REV. STAT. § 30:28(G) (2000).

48. LA. ADMIN. CODE § 43:XIX (2017).

production records and production tests; and section 123, oil and gas measurements. Bottom-hole pressure surveys are addressed in section 127, and directional drilling and well surveys are addressed in section 135. End-of-life plugging and abandonment requirements are set forth in section 137.

The legislature's allocation of authority to the Commissioner in La. Rev. Stat. section 30:4, the step-wise permitting procedure set forth in La. Rev. Stat. section 30:28 (especially the preemptive language in subsection F), and the Commissioner's comprehensive, cradle-to-grave regulations in Statewide Order No. 29-B are all strong indications of an intent to preempt contrary municipal or parochial zoning or land use ordinances. The issue is not entirely free from doubt, however, because of the constitutional underpinnings of some local entities' self-governance rights.

III. LOCAL LAND USE AND ZONING ORDINANCES

A. Home Rule Charters: First Class, Second Class, or None

Cases where local land use or zoning ordinances conflict with state statutes governing the drilling of oil and gas wells have required the Louisiana Supreme Court to balance the state's police power against the local entity's right to govern itself in matters of local interest. The resolution of the tension between these two concerns includes a consideration of whether the parish or city has enacted a home rule charter, which in effect is a mini-constitution for the entity's governance over local issues. Entities that have home rule charters generally have *all powers not expressly withheld* by the state's constitution or statutory laws: "[A] home rule charter government possesses, in affairs of local concern, powers which within its jurisdiction are as broad as that of the state, except when limited by the constitution, laws permitted by the constitution, or its own home rule charter."⁴⁹ Conversely, if the local entity does not have a home rule charter, it is regarded as a subordinate creature of the state, able to exercise *only those powers expressly granted* by the state's constitution or statutes: "A police jury in this state is a creature and subordinate political subdivision of the state and as such only possesses those powers conferred by the state's constitution and statutes."⁵⁰

A further distinction exists between different types of home rule entities, favoring those whose home rule charters were in effect prior to the enactment of the 1974 Constitution. These "first class" home rule

49. *Francis v. Morial*, 455 So. 2d 1168, 1171 (La. 1984).

50. *Rollins Env'tl. Serv. of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127, 1131 (La. 1979) (citing LA. CONST. art. VI, § 7(A)).

charter entities are free to enact local laws except where such action is forbidden *by the constitution*:

[U]nless a legislative act *by a preexisting home rule government* exceeds some limit placed upon its power of initiation *by the 1974 Constitution*, that government's power of immunity prevents the legislature from reversing, withdrawing, or denying an exercise by that city or parish of its power to enact and enforce that local law.⁵¹

On the other hand, if the local entity did not enact its home rule charter until after the adoption of the 1974 Constitution, it is a "second class"⁵² home rule charter entity, free to enact local laws except where such action is forbidden *by the constitution or state statutes*:

[L]ocal governmental subdivisions that acquire[d] home rule powers after the adoption of the constitution do not enjoy the same degree of immunity from control by the legislature. Article VI, section 5 [of the 1974 Constitution] authorizes any such local governmental subdivision to adopt a home rule charter providing for the exercise of any power "necessary, requisite, or proper for the management of its affairs, *not denied by general law or inconsistent with this constitution*."⁵³

These distinctions in different entities' powers to initiate local laws and their immunities from state "interference" may be important in cases pitting the holder of a drilling permit against an entity trying to enforce its zoning regulations. Two Louisiana Supreme Court cases, though not involving drilling permits, illustrate this point.

B. State Police Power v. Local Ordinances

In *Rollins Env'tl. Serv. of Louisiana, Inc. v. Iberville Parish Police Jury*, the plaintiff ("Rollins") entered into a purchase and sale agreement for a deep well disposal facility and the surrounding twenty acres in Iberville Parish.⁵⁴ The Office of Conservation thereupon approved the transfer of the seller's operating permit to Rollins. Shortly after the closing

51. *City of New Orleans v. Bd. of Comm'rs*, 640 So. 2d 237, 245-46 (La. 1994) (emphasis added).

52. "First class" and "second class" are the author's designations.

53. *City of New Orleans*, 640 So. 2d at 246 (emphasis added).

54. *Rollins Env'tl. Serv. of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979).

of the sale, however, Iberville Parish, acting through its police jury, amended an ordinance to prohibit the disposal of “hazardous waste” anywhere in the parish.⁵⁵

Rollins promptly filed suit to enjoin enforcement of the ordinance and to have it declared unconstitutional. The district court denied the injunction and held that the amended ordinance was constitutional; but the Louisiana First Circuit Court of Appeal reversed.⁵⁶ The Louisiana Supreme Court then granted the parish’s application for a writ of certiorari. The parish argued that it was statutorily entitled to amend its ordinance, relying on La. Rev. Stat. sections 33:1236(16) and (31) which, respectively, authorized police juries to enact ordinances to protect against contagious diseases and to regulate trash and garbage disposal. The parish also argued that the state had not legislatively preempted the field.⁵⁷

The Court first noted the subordinate political status of a police jury under article VI, section 7(A) of the 1974 Louisiana Constitution, in that the police jury possesses “only . . . those powers conferred by the state’s constitution and statutes.”⁵⁸ Next, examining the statutes supposedly authorizing the parish’s action, the Court noted that subsection (16) of La. Rev. Stat. 33:1236 allowed only ordinances that were “not inconsistent with the laws and constitution of the United States, nor of this state.” This same limitation did not appear in subsection (31), but the Court held that the limitation “has general application in our law and applies to subsection (31) by implication.”⁵⁹ In other words, according to the Court, the authority of Iberville Parish to enact the amended ordinance was “dependent upon whether the state legislature has not enacted general laws on the same subject and thereby preempted that field of regulation.”⁶⁰

This was an easy question for the Court to answer, because, in several statutory enactments, Louisiana had entirely preempted the field and delegated authority to the Office of Conservation within the Department of Natural Resources, and to the Department of Health and Human Resources.⁶¹ The Court accordingly affirmed the First Circuit’s declaration that the amended ordinance was unconstitutional, and, in language that could be applied to drilling permits, stated further:

55. *Id.* at 1129-30.

56. *Id.* at 1130.

57. *Id.*

58. *Id.* at 1131.

59. *Rollins*, 371 So. 2d at 1131.

60. *Id.*

61. *Id.* at 1133; *see also* LA. REV. STAT. §§ 30:1(D), 3(1)(c), 3(15), 4C(16); 30:1101-16; 40:5, 1299.36 (2018).

[R]egulation of hazardous wastes is a matter of broad national and state concern. From a review of this legislation it is apparent that the matter is such that spotty municipal and parochial control would be ineffective. It is not difficult to conclude that if Iberville Parish is permitted to prohibit the disposal of industrial hazardous waste within its borders there will be, in short order, similar ordinances in every parish of the State. . . . Louisiana's prominent position in industry makes it one of the Nation's foremost producers of chemical and other industrial waste classified as hazardous. As such it cries out [*sic*] against the prospect of such a stifling prohibition.⁶²

In 1994, the Louisiana Supreme Court again addressed a conflict between Louisiana's police power and a local ordinance. This time, however, the local entity was not a subordinate and dependent police jury but was instead a "first class" home rule charter city, whose charter predated the 1974 Louisiana Constitution. In *City of New Orleans v. Bd. of Comm'rs*, the Board of the former Orleans Levee District proposed to build a marina and related developments for commercial profit on state-owned land inside the city of New Orleans without complying with New Orleans' zoning and building ordinances.⁶³ The city sued for a declaratory judgment and an injunction prohibiting the levee district's violation of the city's ordinances, but the trial court and the Louisiana Fourth Circuit Court of Appeal decided:

[T]he [city] could not enforce its zoning and building laws against the [levee district], observing that a state statute enabling [the levee district's] land development activities constituted an exercise of the state police power that superseded the [city's] constitutional home rule powers of legislation and regulation.⁶⁴

The Louisiana Supreme Court granted the city's petition for certiorari, and after setting forth some history of the tension between home rule and state police powers in Louisiana and other states, noted the city's status as a "preexisting home rule municipality"⁶⁵ and proceeded to examine the city's charter. This examination persuaded the Court that New Orleans "stakes a continuing claim, without self-imposed limits, to the utmost

62. *Rollins Env'tl. Serv. of Louisiana*, 371 So. 2d at 1132.

63. *City of New Orleans*, 640 So. 2d at 237 (La. 1994).

64. *Id.* at 241.

65. *Id.* at 243.

powers of initiation available to the city under the constitution.”⁶⁶ The Court was convinced on this point:

[T]he . . . home rule charter asserts, and article VI, section 4 of the constitution authorizes the city to exercise, any legislative power within its boundaries that is not inconsistent with the 1974 constitution.

The power to enact and enforce zoning and building laws plainly falls within the [city’s] home rule power to initiate legislation and regulation. . . . The exercise of this police power to regulate land use by the [city] as part of its retained home rule legislative power is not generically inconsistent with any provision of the constitution. In fact, the zoning power of the [city] is positively confirmed by article VI, section 17 of the constitution, which authorizes local governmental subdivisions to adopt regulations for land use, zoning, and historic preservation. In view of the foregoing, we conclude that the [city’s] home rule powers include the authority to adopt and enforce zoning and building ordinances within the city boundaries.⁶⁷

Having concluded that New Orleans had the authority to initiate zoning and building ordinances, the Court next examined whether the city was immune from any attempt by the legislature to withdraw or deny the city’s power to enforce the ordinances. The Court held that the city was immune, as long as it did not exceed the constitutional limitations on its power:

[T]he legislature may not control, restrain or override a preexisting home rule government’s valid exercise of the power to initiate legislation that is consistent with the constitution. Accordingly, unless a legislative act by a preexisting home rule government exceeds some limit placed upon its power of initiation by the 1974 constitution, that government’s power of immunity prevents the legislature from reversing, withdrawing or denying an exercise by that city or parish of its power to enact and enforce that local law.⁶⁸

New Orleans therefore had both the power to initiate its building and zoning ordinances and immunity from any attempt by the legislature statutorily to supersede them, provided the ordinances did not impinge

66. *Id.* at 245.

67. *Id.* (citing 1974 LA. CONST. art. VI, § 4, 17).

68. *City of New Orleans*, 640 So. 2d at 245-46.

upon the state's police power. The Court again turned to the 1974 constitution to address this third and final issue.

The Court noted that article VI, section 9(B) of the 1974 constitution provides, ambiguously, that "[n]otwithstanding any provision of this Article, the police power of the state shall never be abridged." According to the Court, the purpose of this provision was to harmonize local governments' home rule powers with the state's power "to initiate legislation and regulation necessary to protect and promote the vital interests of its people as a whole."⁶⁹ The Court would consider this police power abridged only "when a local government's conflicting law or ordinance would prevent the state from initiating action through its legislative branch necessary to promote or to protect the health, safety, welfare, or morality of the state as a whole."⁷⁰ The Court then explained the presumptions that must be overcome and the burden of proof that must be carried by a litigant claiming that the state's police power had been abridged:

Article VI of the 1974 Louisiana constitution adopts a new philosophy of the state-local government relationship and strikes a balance in favor of home rule that calls for a corresponding adjustment in judicial attitude. . . . Consequently, home rule abilities and immunities are to be broadly construed, and any claimed exception to them must be given careful scrutiny by the courts. . . . [A] litigant claiming that a home rule municipality's local law abridges the police power of the state must show that the local law conflicts with an act of the state legislature that is necessary to protect the vital interest of the state as a whole. To establish that the conflict actually exists, the litigant must show that the state statute and the ordinance are incompatible and cannot be effectuated in harmony. Further, to demonstrate that the state statute is "necessary" it must be shown that the protection of such state interest cannot be achieved through alternate means significantly less detrimental to home rule powers and rights.⁷¹

Accordingly, the Court concluded that the city did have the power to enforce its building and zoning ordinances on the levee district's construction project within the city's boundaries, reversing the court of appeal.⁷²

69. *Id.* at 249.

70. *Id.* at 250.

71. *Id.* at 252 (citing *Francis v. Morial*, 455 So. 2d at 1173).

72. *City of New Orleans*, 640 So. 2d at 257.

Rollins and *City of New Orleans* are at opposite ends of the spectrum of judicial deference to local enactments. The cases suggest that the holder of a drilling permit issued pursuant to La. Rev. Stat. section 30:28 may have a harder time in litigation against a preexisting home rule charter entity than it will against a police jury. However, neither a police jury nor a preexisting home rule charter entity may legislate on other than purely local matters. The regulation of drilling for oil and gas wells does seem a matter of compelling statewide concern, which should not be subjected to “spotty municipal and parochial control.”⁷³

C. Preemption of the Permitting Process

Three Louisiana appellate courts and the United States Fifth Circuit Court of Appeals addressed local ordinances’ conflicts with Louisiana’s police power in an oil and gas context. The courts in these cases did not rely on the constitutional distinction between home rule charter entities and police juries as a basis for their reasoning. This seems appropriate, because no local entity may legislate on matters of statewide concern, which are the exclusive province of the state legislature. The cases support an argument that Louisiana has preempted the field of oil and gas drilling by means of its statutes and regulations.

1. Traver: Concurrent Jurisdiction?

In *Greater New Orleans Expressway Comm’n v. Traver Oil Co.*, the holder of a mineral lease on state-owned water bottoms in Lake Pontchartrain obtained a drilling permit from the Office of Conservation and a coastal use permit from the Coastal Management Division of the Department of Natural Resources (“DNR”), which allowed it to drill a well 1,338 feet away from the Lake Pontchartrain Causeway.⁷⁴ The Greater New Orleans Expressway Commission sought a rehearing, which the DNR denied, and then sued for an injunction to prohibit the permitted well or any other well within one mile of the causeway. The district court entered judgment allowing the drilling to occur at the permitted site, subject to specified conditions, and the Commission appealed.⁷⁵

The Louisiana Fifth Circuit Court of Appeal framed the issue as whether the district court had erred “in allowing drilling activity and oil production activity within one mile of the [causeway] because such

73. *Rollins*, 371 So. 2d at 1132.

74. *Greater New Orleans Expressway Comm’n v. Traver Oil Co.*, 494 So. 2d 1204, 1205 (La. App. 5th Cir. 1986).

75. *Id.* at 1206.

activity presents a direct and serious threat to public safety and welfare.”⁷⁶ The lessee argued that the Commission had no right of action for an injunction, citing La. Rev. Stat. section 30:204(F)⁷⁷ and section 30:218. This latter statute provides in part that “[n]o injunction shall issue against lessees of the state or state employees to restrain exploration for minerals on state lands.” Without explaining its reasoning or citing any authority, the court of appeal rejected the lessee’s argument:

The main purpose of these statutes is to prevent any state agencies other than the Department of Conservation from establishing other permit requirements applicable to those with a Department of Conservation permit. There is no prohibition in either of the above two sections which prohibit [*sic*] the issuance of an injunction to protect the public safety and welfare.⁷⁸

The court of appeal next rejected another preclusion argument by the lessee, based on La. Rev. Stat. sections 30:204(D)(3) and (E). Acknowledging that the well was not within 500 feet of any residential or commercial structure, the court pointed out that nevertheless the location was within the one-mile “prohibited zone” of the causeway as established by the Department of Wildlife and Fisheries and held that “[a]ctivity within this area does present certain conditions and circumstances that must be properly addressed and must be controlled and restricted.”⁷⁹ Accordingly, the court of appeal affirmed the district court’s admittedly well-considered judgments allowing drilling at the permitted site, subject to numerous operating conditions dictated by prudence and safety concerns.⁸⁰

If misused as precedent, *Traver* could be an example of the axiom, “Hard cases make bad law.” The court in *Traver* did glide too quickly past the prohibitory language in section 204(F) (now section 28(F)) of Title 30 of the Revised Statutes, but, as a practical matter, the result of the case does not offend. Section 28(D)(6) of Title 30 requires the Commissioner to consider comments and information presented at the hearing on whether a permit should issue. It appears that, in *Traver* the Commissioner could and should have conditioned the issuance of the permit upon compliance

76. *Id.*

77. LA. REV. STAT. § 30:28(F) (2000).

78. *Greater New Orleans Expressway*, 494 So. 2d at 1207.

79. *Id.*

80. *Id.* at 1209-15 (district court judgments attached to court of appeal’s opinion as Appendices A, B and C).

with the same requirements imposed by the district court and affirmed by the court of appeal.

2. Desormeaux: *Saltwater Disposal Wells*

Four years after the *Traver* decision, the Louisiana Third Circuit Court of Appeal adjudicated a conflict between the Office of Conservation's permitting process for saltwater disposal wells and a municipality's ordinance banning such wells. In *Desormeaux Enterprises, Inc. v. Village of Mermentau*, a company had purchased a tract of land within the corporate limits of the Village of Mermentau, intending to convert an abandoned oil well on the tract into a disposal well for brine produced in oil and gas exploration.⁸¹ The company published its notice of intention to apply to the Office of Conservation for an operating permit, whereupon Mermentau adopted an ordinance prohibiting the importation into the village of "any foreign material which is considered waste and must be disposed of, [such] as saltwater for injection into a subsurface well. . . ."⁸²

In response to Mermentau's "not in my back yard" ordinance, the plaintiff sued for a declaratory judgment that the ordinance was unconstitutional under Article VI, section 7(A) of the 1974 constitution and was unauthorized under Title 30 of the Louisiana Revised Statutes. The district court held that the statute and *Rollins*⁸³ were determinative:

Clearly, local government bodies . . . have been denied the power to adopt local ordinances independently regulating or permitting or prohibiting the disposal of oil field waste, both hazardous and nonhazardous. The state agencies have exclusive jurisdiction, control and authority over the handling, storage and disposal of such materials.⁸⁴

On appeal, the Louisiana Third Circuit Court of Appeal first reviewed the criteria for finding preemption. Under *Palermo Land Co. v. Planning Comm'n of Calcasieu Parish*,⁸⁵ absent an express provision mandating preemption, courts "determine the legislative intent [to preempt or not

81. *Desormeaux Enterprises, Inc. v. Village of Mermentau*, 568 So. 2d 213 (La. App. 3d Cir. 1990).

82. *Id.* at 214.

83. *Rollins Envtl. Serv. of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979). See *supra* notes 54-62 and accompanying text.

84. *Desormeaux*, 568 So. 2d at 214 (quoting district court's reasons for judgment).

85. *Palermo Land Co. v. Planning Comm'n of Calcasieu Parish*, 561 So. 2d 482 (La. 1990).

preempt] by examining the pervasiveness of the state regulatory scheme, the need for state uniformity, and the danger of conflict between the enforcement of local laws and the administration of the state program.”⁸⁶ The Third Circuit was satisfied that these criteria were met. Section 1(D) of Title 30 of the Revised Statutes states that “[t]he disposal of any waste product into the subsurface by means of a disposal well . . . shall be within the jurisdiction of the department.”⁸⁷ Later in the statute, the legislature specifically requires the Commissioner of Conservation to promulgate regulations specifying the “criteria for the *location*, design and operation of commercial offsite disposal facilities.”⁸⁸ In language that could easily be applied to the regulation of drilling oil and gas wells in Louisiana, the Third Circuit, affirming the district court, concluded:

[T]he regulation of the disposal of any waste product into the subsurface by means of a disposal well, *including siting*, is within the exclusive jurisdiction of the Department of Conservation. The express terms of our pertinent statutory law and the regulations adopted pursuant thereto are pervasive and clearly manifest a legislative intention to preempt such field in its entirety.⁸⁹

3. Energy Management: *City Ordinances*

In 2005, in *Energy Management Corp. v. City of Shreveport*, the United States Fifth Circuit Court of Appeals addressed an ordinance enacted by the City of Shreveport.⁹⁰ The ordinance forbade any new oil and gas drilling within 1,000 feet of Cross Lake, the city’s water supply and, in addition, “set[] up a comprehensive regulatory scheme governing all new drilling between 1,000 and 5,000 feet of Cross Lake.”⁹¹ The plaintiff, an oil and gas exploration company, had acquired several mineral leases from the state covering the lake’s water bottoms and surrounding areas. The company attempted to negotiate a variance from the ordinance so it could drill within the 1,000-foot zone, but the city refused.⁹² The company then sued in federal court.

86. *Id.* at 497, quoted in *Desormeaux*, 568 So. 2d at 214.

87. LA. REV. STAT. § 30:1(D) (emphasis added).

88. *Id.* § 4(I)(7) (emphasis added).

89. *Desormeaux*, 568 So. 2d at 215 (emphasis in original).

90. *Energy Management Corp. v. City of Shreveport*, 397 F.3d 297 (5th Cir. 2005).

91. *Id.* at 300.

92. *Id.*

The company argued that Shreveport was preempted from attempting to regulate drilling operations around Cross Lake and also advanced several other arguments. The company claimed that if Shreveport did have regulatory authority, it had not been reasonably exercised in the ordinance and that even if the authority had been reasonably exercised, it amounted to a taking in violation of the company's equal protection and due process rights under both the Louisiana and the United States constitutions.⁹³ The district court held that Shreveport did have authority to adopt ordinances designed to protect its water supply, that its prohibition against drilling within 1,000 feet of Cross Lake was a reasonable exercise of that authority, and that the company's taking claim was time-barred.⁹⁴

On appeal, after first disposing of Shreveport's challenge to the oil company's standing, the Fifth Circuit addressed the company's argument that Louisiana had preempted the field of oil and gas drilling. Referring to the *Palermo*⁹⁵ three-part test for determining preemption in the absence of an express mandate—the pervasiveness of the state's regulatory scheme, the need for uniformity, and the danger of conflict between the state program and local laws—the court held that Louisiana had preempted the field.⁹⁶

The court found that Title 30 of the Louisiana Revised Statutes and Statewide Order 29-B were “clearly pervasive, addressing every phase of the oil and gas exploration process from exploration and prospecting to clean-up of abandoned oil field waste sites.”⁹⁷ Likewise, according to the Fifth Circuit, “[t]he statute itself reflects a desire for state uniformity and addresses the danger of conflict between the state program and enforcement of local laws.”⁹⁸ On this last point, the Fifth Circuit quoted subsection 28(F) of Title 30, and concluded:

These statutory provisions make it clear that the process of regulating when and where an oil and gas well may be drilled within the state is entirely vested in the [Louisiana Office of Conservation] and interference by other political bodies is prohibited. . . .

As a practical matter, if Ordinance 221 is enforced, this nullifies

93. *Id.* at 300-01.

94. *Id.* at 301.

95. *Palermo*, 561 So. 2d at 497; *see also* *Hildebrand v. City of New Orleans*, 549 So. 2d 1218 (La. 1989).

96. *Energy Management*, 397 F.3d at 303.

97. *Id.*

98. *Id.* at 304.

the [Louisiana Office of Conservation's] authority to exercise its discretion to grant or deny a drilling permit at [the] proposed drill site. In these circumstances, the local ordinance must yield to comprehensive state regulation.⁹⁹

Shreveport argued that *Rollins*¹⁰⁰ and its progeny were not authority for preemption of its ordinance because, unlike Iberville Parish in *Rollins*, Shreveport had a home rule charter. The Fifth Circuit was able to avoid this issue by pointing out that the source of Shreveport's authority to legislate around the 1,000-foot restricted zone was not its charter, but rather a grant of limited police power by the state legislature in 1926. The Fifth Circuit "conclude[d] that . . . Ordinance 221 [was] preempted by state law and [was] invalid to the extent it purport[ed] to prohibit the drilling of oil and gas wells in . . . Louisiana, an authority granted exclusively by state statute and regulations to the Louisiana Office of Conservation."¹⁰¹ The Fifth Circuit accordingly remanded the case to the district court for the entry of a declaratory judgment in conformity with the Fifth Circuit's reversal.¹⁰²

On remand, however, the district court did not hold that Shreveport's ordinance was preempted. Instead, the court ruled only that the ordinance was invalid "to the extent that it purports to prohibit the drilling of oil and gas wells in an area within the state of Louisiana."¹⁰³ This was an important distinction, which led to further disagreement and another trip to the Fifth Circuit:

[The oil company] is concerned that this overly narrow language could lead to the enforcement of provisions that do not prohibit drilling but, nevertheless, restrict related activities because the present judgment implies that Shreveport retains the ability to enforce costly and unnecessary requirements not required by Louisiana for the drilling of oil and gas wells within the State. In contrast, Shreveport argues that the only right exclusively statutorily reserved to the [Office of Conservation] is the oversight of drilling and, therefore, Ordinance 221 is not invalid in its additional respects; it asserts that the district court tracked the

99. *Id.*

100. *See also Rollins*, 371 So. 2d at 1127.

101. *See Energy Management*, 397 F.3d at 306 (2005).

102. *Id.*

103. *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 476 (2006) (internal quotation marks omitted).

limiting language of this court's *Energy Management I* decision.¹⁰⁴

The Fifth Circuit, reversing, held that the district court's declaratory judgment did not comply with the *Energy Management I* panel's holding that the ordinance was preempted in its entirety.¹⁰⁵ That earlier opinion was unmistakably clear on the point,¹⁰⁶ and was supported by the language of the statute itself, case law upholding the "far-reaching" authority of the Office of Conservation, and opinions by the Louisiana Attorney General.¹⁰⁷

This reversal of the portion of the district court's opinion dealing with declaratory relief was cold comfort to the oil company, however, because the Fifth Circuit went on to affirm the remainder of the district court's ruling, which denied damages. The district court had denied the damage claims on the grounds that the minerals the oil company had hoped to extract (i) had never been owned by the company pursuant to Louisiana's fugacious minerals doctrine, because they had never been reduced to possession, and (ii) remained in place, still subject to capture, and so had not been "lost."¹⁰⁸

The Fifth Circuit held that the district court was right for the wrong reason. The oil company had lost an asset—not the minerals themselves, but the mineral leases—but its action for damages, as a taking claim, was subject to a three-year prescriptive period (statute of limitation): "Actions for compensation for property taken by the state, a parish, municipality or other political subdivision . . . shall prescribe three years from the date of such taking."¹⁰⁹ Shreveport had enacted the ordinance in 1990, but the oil company had not filed suit until 1997, well beyond the prescriptive period.¹¹⁰

The Fifth Circuit also addressed an alternative damages theory: a substantive due process claim under 42 U.S.C. 1983, which provides a civil remedy in federal court for violations, under color of state law, of rights guaranteed by the United States Constitution and laws. In order to prevail on this claim the oil company would have to prove both (i) that it had a property interest entitled to Fourteenth Amendment protection, which the Fifth Circuit assumed the oil company could prove, and (ii) that

104. *Id.* at 477.

105. *Id.* at 479.

106. *See* 397 F.3d at 303 ("[L]ocal regulation of oil and gas drilling activities is preempted by comprehensive state regulation of oil and gas activities under the [Office of Conservation].").

107. 467 F.3d at 478-79.

108. *Id.* at 476.

109. LA. REV. STAT. § 13:5111 (2011).

110. 467 F.3d at 480, n.10.

the ultimately struck-down ordinance was not rationally related to a legitimate government interest, which the Fifth Circuit held the company could not prove:

[T]he enactment of Ordinance 221 was rationally related to Shreveport's interest in protecting its water supply. The state of Louisiana gave Shreveport the authority in Act 31 of 1910 to adopt ordinances to protect its water supply The fact that the ordinance is deemed preempted by state law does not convert Shreveport's actions into a violation of [the oil company's] due process rights.¹¹¹

Lastly, the Fifth Circuit affirmed the district court's denial of the oil company's "prevailing party" attorney's fee claim under 42 U.S.C. 1988, because the oil company had not prevailed on its damages claim, and remanded the case to the district court for a determination of an award of costs, which the district court had not mentioned in its judgment.¹¹²

4. Welsh: *Parish Ordinances*

St. Tammany Parish has a home rule charter that it adopted in 1998, twenty-four years after the enactment of the 1974 Louisiana Constitution. Therefore, its powers of self-rule extend only to those matters not prohibited by the constitution or state statutes.¹¹³ This limitation on the parish's powers was decisive in a recent case, in which the parish unsuccessfully sought a declaratory judgment that its zoning designation of an area where the Commissioner of Conservation had issued a drilling permit rendered drilling pursuant to the permit illegal. In *St. Tammany Parish Gov't v. Welsh*, the Commissioner had issued a unitization order in the Lacombe Bayou Field located in St. Tammany Parish, and had issued a permit to Helis Oil & Gas Company ("Helis") for the drilling of the unit well.¹¹⁴ Although the drill site was in an uninhabited area, its location was bound to cause controversy:

The proposed well is located in a wholly residential area designated as "A-3 Suburban District" on the St. Tammany Parish zoning map and sited over and through the Southern Hills Aquifer, the sole source of drinking water in the area. No structures are situated within a one-mile radius of the proposed drilling site, and the

111. *Id.* at 481-82.

112. *Id.* at 483-84.

113. *See* discussion *supra* Section III(A).

114. *St. Tammany Parish Gov't v. Welsh*, 199 So. 3d 3 (La. App. 1st Cir.), *writ denied*, 194 So. 3d 1108 (La. 2016).

property has been a pine tree farm for at least the past thirty years.¹¹⁵

The parish sued James H. Welsh, the Commissioner of Conservation, seeking a declaratory judgment that the drilling permit was illegal under the parish's zoning ordinance. A citizens' group intervened in support of the parish, and Helis intervened on behalf of the Commissioner. All parties filed motions for summary judgment. The trial court ruled in favor of Helis, declaring that the parish's zoning ordinances were preempted by "general state law and, therefore, unconstitutional," and in favor of the Commissioner, declaring that the Office of Conservation had complied with state law in connection with the drilling permit.¹¹⁶

On appeal, the Louisiana First Circuit Court of Appeal first invoked Article IX, Section 1 of the Louisiana Constitution, which requires that the legislature protect Louisiana's natural resources, and commented that, in compliance with the constitutional mandate, "[t]he Legislature has created an extensive body of law that addresses every phase of the oil and gas exploration process, from the initial exploration and drilling phases to clean-up and disposal of waste."¹¹⁷ The court then quoted La. Rev. Stat. section 30:28(F), and stated that "St. Tammany Parish's zoning ordinances must yield" based on that language, which "clearly and manifestly evinces the legislative intent to expressly preempt that area of the law."¹¹⁸ According to the court, the parish's home rule charter was trumped not only by the state constitution, but also by statutes such as La. Rev. Stat. section 30:28(F). The court concluded that Commissioner Welsh, as required by La. Rev. Stat. section 33:109.1, had indeed given due consideration to the parish's ordinances that zoned the drill site area residential, prior to issuing the drilling permit. The trial court's ruling was affirmed in all respects.¹¹⁹

115. *Id.* at 5. The First Circuit noted that "the United States Environmental Protection Agency designated the Southern Hills Aquifer as the sole source of drinking water for the area of the proposed well." *Id.* at 5, n.2.

116. *Id.* at 5-6.

117. *Id.* at 7.

118. *Id.* at 8.

119. *Id.* at 11. For Helis, all of this was for naught. On September 20, 2016 the company announced that it would not proceed with a second phase involving hydraulic fracturing, having "determined that the prospect lacks appropriate commercial viability. . . . Helis intends to permanently abandon the well and secure the site in accordance with regulatory requirements and its leases." Robert Rhoden, *Helis Oil Abandons Fracking Project in St. Tammany Parish*, THE TIMES-PICAYUNE (Sept. 20, 2016), <https://perma.cc/7TES-XFDL>.

CONCLUSION

City of New Orleans and *Traver* appear to be the only chinks in the Commissioner's armor of preemption. But the special circumstances of those cases—in *City of New Orleans*, a pre-1974 home rule charter city's regulation of purely local matters; in *Traver*, some shared jurisdiction with the Department of Wildlife and Fisheries over the drill site—diminish any threat they pose to the Commissioner's powers. Ultimately the Commissioner's authority is grounded in the strongly-worded admonition to agencies and political subdivisions in La. Rev. Stat. section 30:28(F), which clearly indicates the legislature's intent to preempt regulation of oil and gas drilling in Louisiana. The prudent safety restrictions imposed by the district court in *Traver* do counsel the Commissioner to proceed carefully when permitting drilling in populated areas or near highways.